83-565

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1983

JAMES G. INGLIS,
Petitioner,

vs.

MILTON FEINERMAN, in his individual capacity as President of Federal Home Loan Bank of San Francisco; and Federal Home Loan Bank of San Francisco, a corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ELIZABETH G. LEAVY*
RUSSELL LEIBSON
CARROLL, BURDICK & McDONOUGH
One Ecker Building, Suite 400
Ecker and Stevenson Streets
San Francisco, CA 94105
Telephone: (415) 495-0500
Attorneys for Petitioner, James G. Inglis

**Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Whether employers governed by at-pleasure statutes who officially adopt employee manuals which state that employment may be terminated only for certain causes are bound by these manuals; and

2. Whether employees of a federal banking institution, whose enabling statute contains dismissal-at-pleasure language, may be terminated for any reason or for no reason at all, even if that reason violates important public policy; notwithstanding decisional law to the contrary in most jurisdictions with similar at-pleasure statutes.

PARTIES

The parties to the proceedings in the Ninth Circuit and the district court appear wholly in the caption.

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES CITED

Cases

TABLE OF AUTHORITIES CITED

Statutes

No.

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM 1983

JAMES G. INGLIS,

Petitioner,

vs.

MILTON FEINERMAN, in his individual capacity as President of Federal Home Loan Bank of San Francisco; and FEDERAL HOME LOAN BANK OF SAN FRANCISCO, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, James Inglis, respectfully petitions that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, Entered on March 8, 1983

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, not yet reported, appears in the Appendix

attached hereto, as does the Court of Appeals' order of July 5, 1983 denying the petition for rehearing and suggestion for a rehearing en banc.

Neither the memorandum decision and order of April 20, 1982 of the United States District Court for the Northern District of California, granting Defendants' motion for summary judgment, nor the Court's judgment is officially reported. Copies of these documents are attached hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 8, 1983, affirming the District Court's grant of Respondents' Motion for Summary Judgment dated April 20, 1982. A timely petition for rehearing and suggestion of rehearing en banc was denied July 5, 1983 and this petition for certiorari was filed within 90 days of that date.

Petitioner invokes jurisdiction of this Court under 28 U.S.C. section 1254(1).

STATUTES

The relevant statutes are: 12 U.S.C. sections 341 (Fifth), 1421, 1432 and 28 U.S.C. Section 1441.

I

STATEMENT OF CASE

The present litigation arose out of the discharge of Plaintiff James Inglis from his employment as Vice President and Internal Auditor with the Federal Home Loan Bank of San Francisco on September 1, 1981. (C.T. 12) Plaintiff (Petitioner herein) filed his Complaint for damages on October 9, 1981 in San Francisco County

Superior Court against the Federal Home Loan Bank of San Francisco (hereinafter "Bank") and Milton Feinerman, the Bank president, alleging that Defendants (Respondents herein) wrongfully terminated Plaintiff from his employment with the Bank.

In his complaint, Plaintiff alleged that he was terminated in violation of public policy, in that he was terminated because of his insistence that the Bank and its officers comply with various federal laws and Bank regulations. Plaintiff also contended that he was terminated in violation of provisions of a Bank Employee handbook which, although adopted after his initial hire, was in effect for many years prior to his termination. The handbook set forth certain specific causes for termination, provided that employment was based upon good faith,

and provided for a hearing before the taking of disciplinary action.

The action was removed by Respondents to the United States District Court for the Northern District of California on November 20, 1981, pursuant to 28 U.S.C. section 1441. (C.T. 4) On November 30, 1981, Respondent Federal Home Loan Bank of San Francisco filed a Cross-Complaint against Plaintiff James Inglis. (C.T. 6)

On April 21, 1982, following a hearing on a motion brought by Defendants the District Court granted Summary Judgment on substantially all of Plaintiff's claims holding that Plaintiff's claims were preempted by the at-pleasure language of the Federal Home Loan Bank Act, and that any rights created under the Employee Manual were void and unenforceable. The Court's decision was based primarily on an opinion in which the Ninth Circuit had

affirmed the discharge of a Federal Reserve Bank employee pursuant to similar "at pleasure" language in the Federal Reserve Bank Act. Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d 1093 (9th Cir. 1981), Cert denied, 102 S. Ct. 1149 (1982).

A final judgment dismissing Plaintiff's entire Complaint with prejudice was entered on June 22, 1982 (C.T. 41).

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 8, 1983, affirming the District Court decision.

II

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's holding that representations in an officially promulgated manual of a Federal Banking Institution are unenforceable conflicts with decisions in other circuits and goes beyond the Ninth Circuit's previous holding in Bollow v. Federal

Reserve Bank of San Francisco, 658 F.2d 1093 (1981)

Rejecting Plaintiff's contention that certain rights were created by the Federal Home Loan Bank Employee Manual, despite the existence of at-pleasure language in the Federal Home Loan Bank,The Honorable David Williams, United States District Judge for the Central District of California, sitting by designation, wrote:

> [W]e follow Bollow and hold that attempts to create employment rights from independent sources such as the Employment Manual are void under the Federal Home Loan Bank Act.
>
> Opinion, p. 3, lines 9-12

With all due respect, it is submitted that Bollow does not compel such a holding. Bollow involved a representation by president of the Federal Reserve Bank that Bollow would enjoy continued employment so long as his preformance remained satisfactory. The Ninth Circuit

held that such representations by the bank president were ultra vires, and that Bollow was not entitled to rely upon such representations since they contravened the at-pleasure language of the Federal Reserve Bank Act. Bollow specifically left open the question of whether or not the Bank's Personnel Manual, which provided certain procedural guarantees prior to termination, limited the Bank's otherwise unbridled discretion to discharge its employees at will. Thus, the Ninth Circuit stated:

> Bollow also argues that, notwithstanding Sections 4, Fifth, the Bank was required to comply with its published personnel manual, and that it failed to do so. The district judge found that the Bank substantially complied with the manual procedures for discharging employees for misconduct. This finding is adequately supported by their record. Thus, even if we assume that the Bank's authority to discharge employees pursuant to Section 4, 5th, is somehow limited by the Personnel Manua, we find that the Bank has

> complied with the requirements of the Manual. (emphasis added)
>
> Bollow v. Federal Reserve Bank of San Francisco, supra, at 1098.

Moreover, the Ninth Circuit opinion in the instant action did not even address the estoppel arguments raised in Appellant's Brief or the cases in which such estoppel arguments had been raised. Thus, for example, in a California Court of Appeal's decision in Healdsburg Police Officers Association v. City of Healdsburg, 57 Cal. App. 3d 444 (1976), the Court of Appeal found that, notwithstanding the existence of California Government Code section 36506, which expressly provides that peace officers serve at the pleasure of the city council, predisciplinary procedural protection set forth in the Healdsburg police department manual are enforceable, and compliance with the manual is required. Healdsburg

Police Officers Association v. City of Healdsburg, supra, at 449.

In Healdsburg the court specifically rejected the City's argument that the protections afforded by the manual were ultra vires and void, invoking the theory of equitable estoppel against the City:

> It is black-letter law that where justice requires it, the doctrine of equitable estoppel may be invoked against a ... governmental agency [citations]. This doctrine, of course, precludes the consenting or acquiescing party from disputing the validity of acts which were beyond the legitimate powers of the parties when done pursuant to, or in reliance upon, such consent or acquiescence [citations]. Therefore, Appellants' claim that the enactment of the manual constituted an ultra vires act automatically failed. We are likewise at a loss to discern any substance to Appellant's contention that the theory of equitable estoppel may not be relied upon by respondents because it was not raised in the proceedings below. It is axiomatic that although estoppel is generally a question of fact, where, as here, the evidence is

> not in conflict and is susceptible of only one reasonable inference, the existence of estoppel becomes a question of law [citations]. Healdsburg Police Officers Association v. City of Healdsburg, supra, at 454.

The Healdsburg court's reasoning applies with equal force in the present case. The Bank's employee handbook expressly stated that Bank employees were afforded certain procedural safeguards prior to termination or other disciplinary measures. The employee handbook stated that Bank employees were expected to abide by the rules and regulations published therein and that failure to do so would result in disciplinary action. Thus, under general equitable principles, the Bank should be estopped to deny the validity and enforceability of the procedural guarantee of a hearing prior to discharge and the substantive guarantee

that the employment would be based on good faith.

Finally it is well-established that agencies are under an obligation to follow their own regulations, proceedings, and precedents, or provide a rational explanation for their departure. See, e.g., Vitarelli v. Seaton, 359 U.S. 535 (1950); Associated Builders v. U.S. Department of Energy, 451 F.Supp. 281, 286-287 (1978); Mazaleski v. Treusdell, 562 F.2d 701 (D.C. Cir. 1977), (termination found to be illegal because the Public Health Service failed to follow the procedure for involuntary terminations set forth in its personnel manual.)

The principles and authorities outlined above apply with equal force to the instant case. Notwithstanding section 1432(a) of the Federal Home Loan Bank Act, 12 U.S.C. 1421, et seq., which entitles the Bank to dismiss employees at pleasure,

the Bank has set forth certain pretermination procedural safeguards in its Employee Handbook. In so doing, the Bank "contracted" with its employees, and claims seeking to enforce that contract are not foreclosed.

Nor does Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d 1093 (9th Cir. 1981) hold otherwise. The Bollow court did not decide whether or not a cause of action based on failure to comply with personnel regulations would withstand a motion to dismiss, since it found there had been substantial compliance with the personnel regulations. Bollow, supra, at 1098. This distinction is clear from the following passage in Bollow:

> Bollow also argues that, notwithstanding Section Four, Fifth, the bank was required to comply with its published personnel manual, and that it failed to do so. The District Judge found that the bank sub-

> stantially complied with the manual procedures for discharging employees for misconduct. This finding is adequately supported by the record. Thus, even if we assume that the bank's authority to discharge employees pursuant to Section Four, Fifth, is somehow, limited by the personnel manual, we find that the bank has complied with the requirements of the manual. (emphasis added)
>
> Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d 1093, 1098.

B. No authority supports the holding that an employee employed pursuant to an at-pleasure provision in a National Banking Act statute may be terminated for reasons contrary to public policy.

As is indicated above, provisions in the Federal Reserve Bank Act (12 U.S.C. section 341) and the National Banking Act (12 U.S.C. section 24 Fifth), as well as the applicable provision in the Federal Home Loan Bank Act (12 U.S.C. section 1432), provide for termination at will of banking employees. Thus, the Ninth Circuit ruling in this case, by

implication, bestows upon all Federally regulated Banking Institutions in the United States a right that is denied to any other employer, whether public or private -- i.e. the right to terminate an employee for reasons contrary to public policy.

Such a holding is clearly not mandated by Bollow. Similar claims of termination in violation of public policy were raised in Bollow and addressed on the merits. Thus, the Ninth Circuit stated:

> Finally, Bollow . . . [alleged] that he was terminated because he exposed Bank and Board irregularities in the handling of a certain regulatory matter. He now contends that the district court erred in granting the Bank's and Board's motions for summary judgment on these claims. Regarding the Board, it is clear that the Board was not legally or factually implicated in the Bank's decision to terminate Bollow. With respect to the Bank, there was offered in support of its motion Reilly's sworn declaration that the decision to terminate Bollow was based solely on the latter's

> inability to get along with his co-workers. Bollow offered no evidence in response; he merely repeated the allegations of his complaint. A party cannot withstand a motion for summary judgment merely by asserting that the facts are disputed; he must present sufficient evidence to the court to show that there is indeed a genuine issue of material fact. [citation] Bollow's evidence consisted exclusively of disjointed and conclusory allegations based on mere suspicion and belief. He brought nothing before the court to show that he would be able to support his allegations with evidence at trial. Accordingly, we affirm the district court's grant of summary judgment on these claims in favor of the Bank and Board.
>
> Bollow v. Federal Reserve Bank of San Francisco, supra, at 1102-3.

Moreover, the Ninth Circuit opinion is not only inconsistent with Bollow, but, in addition, contrary to the weight of authority in all jurisdictions. Thus, in addition to decisional law in California, e.g., Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 172 (1980),

Petermann v. International Brotherhood of Teamsters, 174 Cal. App. 2d 184 (1959) courts have sustained the maintainability of such claims, despite employment-at-will statutes, in nearly every other state of the union. 2/ Clearly the absence of federal decisions springs from the fact that virtually all federal employees have long been subject to elaborate protections against discharges in violation of public policy under the Civil Service Reform Act and other legislation. There is absolutely no authority for the proposition that banking employees should be singled out so that they are afforded none of the protections that have been afforded by statute to employees in the public sector and by judicial interpretation to employees in the private sector.

CONCLUSION

The Ninth Circuit's holdings that Banking institutions operating pur-

suant to at-pleasure employment statutes (1) are not bound by representations made in officially promulgated employee manuals, and (2) may terminate employees for reasons violative of public policy, is contrary to the weight of decisional law, and goes beyond the Ninth Circuit's holding in Bollow v. Federal Reserve Bank, supra. Guidance from this Court is clearly mandated in order to define the scope of employment rights afforded to employees in federally regulated banking institutions. Accordingly, it is respectfully submitted that Petitioner's Petition for Writ of Certiorari should be granted.

Dated: This 29th day of September, 1983.

Respectfully submitted,

CARROLL, BURDICK & McDONOUGH

By _____
Elizabeth G. Leavy
Attorneys for Petitioner

Ingl/T

1/ Other jurisdictions have similarly held that where an employee attempts to exercise rights afforded by statute, a right of action for wrongful discharge will lie. See, Frampton v. Central Indiana Gas Co., 297 N.E.2d 425 (Ind. 1973) (recognized public policy exception for statutorily conferred personal rights); Svento v. Kroger Co., 245 N.W.2d 151 (Mich.App. 1976) (cause of action for wrongful discharge where employee filed claim against employer under state worker's compensation statute).

2/ See, Lampe v. Presbyterian Medical Center, 590 P.2d 513 (Colo. 1978) (employer's motivation for discharge must contravene clear mandate of public policy); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980) (retaliatory dismissal of employee who insisted on compliance with state licensing and labeling law); Jackson v. Minidoka Irrigation District, 563 P.2d 54 (Idaho 1977) (employer's motivation for discharge must contravene clear mandate of public policy); Kelsay v. Motorola, 384 N.E.2d 353 (Ill. 1978) (cause of action for wrongful discharge based on employee's exercise of statutory rights); Palmateer v. International Harvester, Inc., 421 N.E.2d 876 (Ill. 1981) (action for retaliatory discharge where employee terminated for "whistle-blowing"); Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978) (termination violative of clear public policy may be actionable); Murphy v. City of Topeka, 630 P.2d 186 (Kan. App. 1981) (adopts tort of retaliatory dis-

---

2/ (continued)

charge in at-will setting); Scroghan v. Krafco Corp., 551 S.W.2d 811 (Ky. 1977) (motivation for discharge actionable if contravenes clear public policy of state); Adler v. America Standard Corp., 432 A.2d 464 (Md. 1981) (discharge actionable if violative of clear mandate of public policy); Keneally v. Orgain, 606 P.2d 127 (Mont. 1980) (motivation for discharge must contravene clear mandate of public policy); Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974) (cause of action for retaliatory discharge for refusal to date foreman); Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505 (N.J. 1980) (discharge actionable if violative of clear mandate of public policy); Ness v. Hocks, 536 P.2d 512 (Or. 1975) (wrongful discharge where employee terminated for serving jury duty); Brown v. Transcon Lines, 588 P.2d 1087 (Ore. 1978) (cause of action for wrongful discharge for filing workmen's compensation claim against employer); Reuther v. Fowler & Williams, 386 A.2d 119 (Pa. 1978) (employee stated cause of action for wrongful discharge where terminated for serving jury duty); Perks v. Firestone Tire and Rubber Co., 611 F.2d 1361 (3rd Cir. 1979) (cause of action for wrongful discharge where employee refused polygraph test); Jones v. Keogh, 409 A.2d 581 (Vt. 1979) (actionable right where discharge violates "clear and compelling" public policy); Ward v. Frito-Lay, Inc., 290 N.W.2d 536 (Wis. App. 1980) (cause of action maintainable where employee exercises statutorily or constitutionally guaranted right).

Ingl/M

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES G. INGLIS,	)	
	)	
Plaintiff-Appellant,	)	No. 82-4404
	)	D.C. #
v.	)	Cv. 81-4429 MHP
	)	
MILTON FEINERMAN, in his individual capacity as President of Federal Loan Bank of San Francisco; and Federal Home Loan Bank of San Francisco, a corporation,	)	OPINION
	)	
Defendants-Appellees.	)	

Appeal From the United States District Court
For the Northern District of California,
Honorable Marilyn H. Patel,
Judge Presiding.

Argued and Submitted: February 18, 1983

Before: CHOY and ALARCON, Circuit Judges, and D. WILLIAMS*, District Judge

WILLIAMS: District Judge

---

* The Honorable David W. Williams, United States District Judge for the Central District of California, sitting by designation.

Appellant James G. Inglis [Inglis] appeals a District Court grant of summary judgment which upheld his termination of employment from appellee Federal Home Loan Bank of San Francisco [Bank] without a disciplinary hearing as outlined in the Bank's personnel manual. The Bank claims it terminated Inglis for an admitted breach of employee confidentiality.

The Bank was created under the Federal Home Loan Bank Act, 12 U.S.C. § 1421, et seq. In 12 U.S.C. § 1432(a), the Act provides in pertinent part:

> the bank shall have the power to -- select, employ and fix the compensation of such officers, employees, attorneys, and agents . . . and to dismiss at pleasure such officers, empoyees and agents; (Emphasis added.)

These provisions are similar to language in 12 U.S.C. § 341 (Fifth) of the Federal Reserve Act which gives Federal Reserve Banks the power to "dismiss at

pleasure such officers or employees." In Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d 1093 (9th Cir. 1981), this court construed that section as preempting employee claims of wrongful discharge based on state law.

The plaintiff in Bollow was terminated by a Federal Reserve Bank after eleven years of employment. He sued for reinstatement, but the bank contended it had authority to fire him by virtue of the "dismiss at pleasure" provision of 12 U.S.C. § 341 (Fifth).

On appeal, the Ninth Circuit held that (1) federal law preempted California law and allowed the Federal Reserve Bank to dismiss its employees "at pleasure," and (2) a letter from the bank president to plaintiff assuring him of continued employment was ultra vires under the Federal Reserve Act and thus void.

In the instant case, Inglis argues that since the Bank adopted an employee manual which stated that employment was based on "good faith" and established procedures for disciplinary actions, the Bank should not be permitted to dismiss him except for certain causes. First, we note that this manual was not adopted by the Bank until well after Inglis was hired. Notwithstanding this difficulty with appellant's claim, we follow Bollow and hold that attempts to create employment rights from independent sources such as the employment manual are void under the Federal Home Loan Bank Act.

Inglis next urges us to follow Tameny v. Atlantic Richfield Co., 27 Cal.3d 167 (1980), which limited an employer's right under Cal. Lab. Code § 2922 to terminate an employee "at will." The Tameny court held that, despite § 2922, Atlantic Richfield wrongfully discharged

plaintiff for refusing to participate in an illegal price fixing scheme. Appellant argues that 12 U.S.C. § 1432(a) should be similarly limited and claims that the real reason for his termination was his insistence that the Bank conform its practices to federal law. We hold that § 1432(a) permits no inroads into the "dismiss at pleasure" language.

Inglis' constitutional claims are equally without merit. Inglis did not have a sufficient property interest in continued employment to invoke due process guarantees, and the Bank's termination of Inglis did not deprive him of any cognizable liberty interest.

The decision of the District Court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES G. INGLIS,	)	
	)	No.
Plaintiff-Appellant,	)	82-4404
	)	
v.	)	Dist. of
	)	No. Calif.
MILTON FEINERMAN, in his individual capacity as President of Federal Loan Bank of San Francisco; and Federal Home Loan Bank of San Francisco, a corporation,	)	ORDER
	)	
Defendants-Appellees.	)	

Before: CHOY and ALARCON, Circuit Judges, and WILLIAMS*, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing, and a majority of the panel has voted to reject the suggestion for rehearing en banc.

---

* The Honorable David W. Williams, United States District Judge for the Central District of California, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing an banc. Fed.R. App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Ingl/Q

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES G. INGLIS, Plaintiff, vs. MILTON FEINERMAN, Defendants. AND RELATED CROSS-ACTION.	)	No. C-81-4429 MHP MEMORANDUM DECISION AND ORDER

This matter comes before the court on defendants' motion for summary judgment. Plaintiff's complaint sets forth several causes of action arising from the termination of his employment. They comprise claims for breach of contract, tort claims, and constitutional claims of "liberty" and "property" due process violations. Defendants have moved for summary judgment. Plaintiff has agreed

to the dismissal without prejudice of his second and ninth causes of action.

BACKGROUND

Plaintiff was terminated from his employment as a Vice President and Internal Auditor of defendant Federal Home Loan Bank of San Francisco. Defendants Bank and Bank President Feinerman allege that plaintiff was terminated for failure to adequately carry out his duties as an officer of the Bank. More specifically, defendants assert that plaintiff committed a serious breach of confidentiality in disclosing certain information to a fellow employee. Plaintiff admits this disclosure, but contends it did not amount to a breach of confidentiality; and further he asserts that he was actually terminated due to his repeated insistence over the years that the Bank and its officers

comply with various federal laws and Bank regulations.

Plaintiff was terminated without a formal hearing. The Bank's Employee Handbook, in very general terms, provides that employment is based upon "good faith" and outlines various remedial and disciplinary approaches that could be taken in confronting employee problems.

CONTRACT CLAIMS

Plaintiff's first, third, and fifth causes of action allege breaches of both express and implied contractual duties. Plaintiff claims that the terms of the Bank's "Employee Handbook" providing for good faith, equitable treatment, and fair hearings, formed part of his express employment contract; and that the Bank had also made an implied covenant of continued employment and termination only upon just cause.

However, a reading of the controlling statutes and Ninth Circuit authority has convinced this court that any express or implied employment contracts entered into by the Bank or its agents with plaintiff are void and unenforceable.

Federal Home Loan Banks were created, and are governed by, the Federal Home Loan Bank Act, 12 U.S.C. § 1421, et seq. (the "Act"). Section 1432(a) of the Act provides that Federal Home Loan Banks shall have the power "to dismiss at pleasure such officers, employees, attorneys, and agents" as they see fit (emphasis added).

The Ninth Circuit has recently interpreted an identical provision of the Federal Reserve Act, 12 U.S.C. § 341 (Fifth), to preclude Federal Reserve Banks from entering into employment contracts that grant any greater tenure rights to

employees, and to void any such contracts entered into by the Banks. In Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d 1093 (9th Cir. 1981), the plaintiff, an employee of the defendant Bank, was terminated. He claimed a contractual right to employment by virtue of a letter he received from the Bank President assuring him of employment as long as his work was satisfactory. In interpreting the "dismiss at pleasure" clause of the Federal Reserve Act, identical to the one applicable in the case at bar, the court held that "[n]o process rights are conferred on reserve bank employees by [the dismiss at pleasure clause], and efforts to confer such rights--as, for example, by contract--are void as violative of the statute." Id. at 1097.

The Bollow court cited with approval Armano v. Federal Reserve Bank of

Boston, 468 F. Supp. 674 (D. Mass. 1979), which held that

> a contract that binds the Bank by requiring just cause for dismissal prevents the Bank from exercising its express power to dismiss an employee at pleasure. By that provision, Congress clearly sought to protect Federal reserve banks from unnecessary restrictions in carrying out their financial responsibility. Neither the Act's express powers nor incidental powers thereto authorize federal reserve banks to bind themselves in employment contracts.

Id. at 676. See also Sims v. Fox, 505 F.2d 857 (5th Cir. 1974) (en banc), cert. denied, 421 U.S. 1011 (1975).

The same reasoning applies to the "dismiss at pleasure" clause of § 1432(a) of the Federal Home Loan Bank Act. Thus, any express or implied employment contracts allegedly made by the Bank with plaintiff are void as violative of that statute.

Further, while California law grants "at will" employees certain process

and tenure rights, state law cannot provide any independent rights that would contravene or hinder the Bank's federally granted power to dismiss employees at pleasure.

> Attempts to create such rights by reference to independent sources are violative of the statute and void thereunder. Assuming that [plaintiff] would indeed have been entitled to certain process rights under California law, such law when applied to reserve bank employees conflicts with [the "dismiss at pleasure" clause]. In such circumstances, the federal statute must control.

Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d at 1098. This court holds that 12 U.S.C. § 1432(a) likewise preempts any California law that would otherwise provide plaintiff with greater process and tenure rights than are provided by that statute. Accordingly, summary judgment for defendants is granted on plaintiff's first, third, and fifth[6] causes of action.

TORT CLAIMS

Plaintiff's fourth, sixth, seventh, and eighth causes of action assert claims sounding in tort. As presented, each of these claims is problematic.

Plaintiff's fourth cause of action alleges wrongful discharge in that plaintiff's termination was against public policy. Plaintiff acknowledges this claim is made under California law which requires that a termination be consistent with public policy. See Tameny v. Atlantic Richfield Co., 27 Cal.3d 167, 172 (1980).

However, by granting Federal Home Loan Banks the power to dismiss employees at pleasure, Congress clearly sought to protect the Banks "from unnecessary restrictions in carrying out their financial responsibilities." Armano v. Federal Reserve Bank of Boston, 468

F. Supp. at 676. To require compliance with state public policy clearly would impose additional restrictions upon Federal Home Loan Banks in carrying out their responsibilities, contrary to congressional intent. Thus, a state created cause of action for wrongful discharge in violation of public policy must be preempted by 12 U.S.C. § 1432(a). Accordingly, summary judgment for defendants is granted on plaintiff's fourth cause of action.

Plaintiff's sixth and seventh causes of action assert claims of intentional and negligent infliction of emotional distress, and general negligence. However, as the court reads plaintiff's amended complaint, the tortious conduct alleged in these causes of action amounts to nothing more than defendants' act of discharging plaintiff. "His [alleged] emotional distress was an incident of the

wrongful discharge. . . . Every employee who believes he has a legitimate grievance will doubtless have some emotional anguish occasioned by his belief that he has been wronged. Artful pleading cannot conceal the reality that the gravamen of the complaint is wrongful discharge." Magnusson v. Burlington Northern, Inc., 576 F.2d 1367, 1369 (9th Cir.), cert. denied, 439 U.S. 930 (1978). Insofar as these tort claims assert only plaintiff's discharge as the tortious conduct complained of, they are likewise preempted by 12 U.S.C. § 1432(a). If the manner employed by defendants in discharging plaintiff was so egregious as to constitute a tort, or if an act of a tortious nature was committed independent of the actual discharge, plaintiff may have a cause of action against defendants sounding in tort. As presently framed, they are insufficient to state tort claims. The

sixth and seventh claims are dismissed without prejudice to the filing of amended claims if plaintiff can allege the requisite facts.

The court offers no opinion as to whether the Federal Home Loan Bank is a "federal instrumentality" for purposes of the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq. Nor, consequently, is any opinion offered as to whether proper tort claims against the Bank would arise under state or federal law.

Finally, plaintiff's eighth cause of action asserts that defendants intentionally interfered with his contractual relationship with the Bank. Even if this claim is viewed as sufficiently independent of the discharge to survive preemption, it is without merit. Under California law, such a claim can only be made against a non-party to the contract. Thus, the claim cannot be made against

defendant Bank. Further, defendant Feinerman, as Bank President, was privileged with absolute authority in discharging plaintiff. Under California law, a manager cannot "be held liable for inducing the breach for [his] action [is] that of the corporation itself." Marin v. Jacuzzi, 224 Cal. App. 2d 549 (1964). Plaintiff's claim is without merit. Accordingly, summary judgment for defendants is granted on plaintiff's eight cause of action.

DUE PROCESS--PROPERTY CLAIM

Plaintiff's tenth cause of action alleges that defendants deprived him of a property interest in continued employment without due process of law in violation of the fifth and fourteenth amendments.

To have a property interest in a governmental benefit, including employ-

ment, an individual must have an entitlement to the benefit. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Plaintiff bases his alleged entitlement to continued employment upon the provisions of the Employee Handbook, which he claims formed a part of his "employment contract" with the Bank. However, as this court has determined supra, any such provisions are void and unenforceable in light of 12 U.S.C. § 1432(a). "A void contract is clearly insufficient to support of claim of entitlement to government employment." Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d at 1099. Thus, plaintiff did not have a constitutionally protected interest in continued employment sufficient to invoke due process guarantees of the Constitution. Summary judgment is entered for defendants on plaintiff's tenth cause of action.

DUE PROCESS--LIBERTY CLAIM

Plaintiff's eleventh cause of action alleges that defendants unconstitutionally deprived him of "liberty" by dismissing him without a hearing on charges that reflect on his "good name, reputation, honor and integrity."

> The liberty protected by the due process clause of the fifth and fourteenth amendments encompasses an individual's freedom to work and earn a living. Thus, when the government dismisses an individual for reasons that might seriously damage his standing in the community, he is entitled to notice and a hearing to clear his name.

Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d at 1100. See Board of Regents v. Roth, 408 U.S. at 573 n.12.

For such a dismissal to reach constitutional dimensions, however, the reasons for the employee's dismissal must be so serious as to "stigmatize" the employee, by seriously damaging his or her reputation or integrity or significantly

foreclosing his or her freedom to take advantag of other employment. Jablon v. Trustees of California State Colleges, 482 F.2d 997, 1000 (9th Cir. 1973), cert. denied, 414 U.S. 1163 (1974). "[A] charge which infringes one's liberty can be characterized as an accusation or label given the individual by his employer which belittles his worth and dignity as an individual and, as a consequence is likely to have severe repercussions outside of professional life." Stretten v. Wadsworth Veterans Hospital, 537 F.2d 361, 366 (9th Cir. 1976).

Defendants claim that plaintiff committed a breach of confidential trust, which led to his termination. Such a charge clearly implicates one's moral character and "belittles his worth and dignity as an individual."

However, the mere pressure of charges that "stigmatize" an individual

does not infringe constitutional interests. The charges made against the employee must be publicly disclosed. "Unpublicized accusations do not infringe constitutional liberty interests because, by definition, they cannot harm 'good name, reputation, honor or integrity.'" Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d at 1101. Finally, no liberty interest is infringed when the allegations against the employee are true. Sims v. Fox, 505 F.2d at 864.

The only allegations of publication made by plaintiff are based on his assumptions. Defendants flatly deny them. Plaintiff's declaration fails to "set forth specific facts showing that there is a genuine issue for trial" as to defendants' publication of the reasons for his discharge. Fed.R. Civ.P. 56(e). However, the court will permit plaintiff to file supplemental declarations setting forth

facts showing publication by defendants, pursuant to Fed.R. Civ.P. 56(f), prior to rendering a decision on this cause of action.

THEREFORE, IT IS ORDERED THAT:

1. Defendants' motion for summary judgment be and is hereby granted as to plaintiff's first, third, fourth, fifth, eighth, and tenth causes of action.

2. Plaintiff's second, sixth, seventh, and ninth causes of action be and are hereby dismissed without prejudice.

3. Plaintiff be and is hereby granted leave to file supplemental declarations in support of his eleventh cause of action within twenty (20) days of the date of this decision. Defendants shall have ten (10) days to respond.

Marilyn Hall Patel
United States District Judge

DATED: 20 April 1982.
Ingl/P

APPENDIX D

12 U.S.C. § 341. General enumeration of powers

Upon the filing of such [the organization] certificate with the Comptroller of the Currency as aforesaid a Federal reserve bank shall become a body corporate and as such, and in the name designated in such organization certificate, shall have power --

> First. To adopt and use a corporate seal.
>
> Second. To have succession after the approval of this Act [Feb. 25, 1927] until dissolved by Act of Congress or until forfeiture of franchise for violation of law.
>
> Third. To make contracts.
>
> Fourth. To sue and be sued, complain and defend, in any court of law or equity.
>
> Fifth. To appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided for in this Act, to define their duties, require bonds for them and fix the

penalty thereof, and to dismiss at pleasure such officers or employees. The president shall be the chief executive officer of the bank and shall be appointed by the board of directors, with the approval of the Board of Governors of the Federal Reserve System, for a term of five years; and all other executive officers and all employees of the bank shall be directly responsible to him. The first vice president of the bank shall be appointed in the same manner and for the same term as the president, and shall, in the absence or disability of the president or during a vacancy in the office of president, serve as chief executive officer of the bank. Whenever a vacancy shall occur in the office of the president or the first vice president, it shall be filled in the manner provided for original appointments; and the person so appointed shall hold office until the expiration of the term of his predecessor.

Sixth. To prescribe by its board of directors by-laws not inconsistent with law, regulating the manner in which its general business may be conducted, and the privileges granted to it by law may be exercised and enjoyed.

Seventh. To exercise by its boards of directors, or duly

authorized officers or agents, all powers specifically granted by the provisions of this Act and such incidental powers as shall be necessary to carry on the business of banking within the limitatons prescribed by this Act.

Eighth. Upon deposit with the Treasurer of the United States of any bonds of the United States in the manner provided by existing law relating to national banks, to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited, such notes to be issued under the same conditions and provisions of law as relate to the issue of circulating notes of national banks secured by bonds of the United States bearing the circulating privilege, except that the issue of such notes shall not be limited to the capital stock of such Federal reserve bank.

But no Federal reserve bank shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized by the Comptroller of the

Currency to commence business under the provisions of this Act.

12 U.S.C. § 1421. Short Title This Act may be cited as the "Federal Home Loan Bank Act."

12 U.S.C. § 1432. Incorporation of banks and corporate powers

(a) The directors of each Federal Home Loan Bank shall in accordance with such rules and regulations as the board may prescribe, make and file with the board at the earliest practicable date after the establishment of such bank an organization certificate which shall contain such information as the board may require. Upon the making and filing of such organization certificate with the board, such bank shall become as of the date of the execution of its organization certificate, a body corporate, and as such and in its name as designated by the board

it shall have the power to adopt, alter, and use a corporate seal; to make contracts; to purchase or lease and hold or dispose of such real estate as may be necessary or convenient for the transaction of its business, but, except with the prior approval of the board, no bank building shall be bought or erected to house any such bank, or leased by such bank under any lease for such purpose which has a term of more than ten years; to sue and be sued, to complain, and to defend, in any court of competent jurisdiction, State or Federal; to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the trasnaction of its business, subject to the approval of the board; to define their duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and

agents; and, by its board of directors, to prescribe, amend, and repeal by-laws, rules, and regulations governing the manner which its affairs may be administered; and the powers granted to it by law may be exercised and enjoyed subject to the approval of the board. The president of a Federal Home Loan Bank may also be a member of the board of directors thereof, but no other officer, employee, attorney, or agent of such bank, who receives compensation, may be a member of the board of directors. Each such bank shall have all such incidental powers, not inconsistent with the provisions of this Act, as are customary and usual in corporations generally.

(b) Subject to such regulations as may be prescribed by the Board, one or more Federal home loans banks may acquire, hold, or disposition by members of any such bank of, housing project loans, or

interests therein, having the benefit of any guaranty under section 221 of the Foreign Assistance Act of 1961 [ ], as now or hereafter in effect, or loans, or interests therein, having the benefit of any guaranty under section 224 of such Act [ ], or any commitment or agreement with respect to such loans, or interests therein, made pursuant to either of such sections. This authority extends to the acquisition, holding, and disposition of loans, or interests therein, having the benefit of any guaranty under section 221 or 222 of the Foreign Assistance Act of 1961 [ ], as amended by section 105 of the Foreign Assistance Act of 1969 [ ] or as hereafter amended or extended, or of any commitment or agreement for any such guaranty.

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a

citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title [ ] may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time

limitations of section 1446(b) of this chapter [ ] may be enlarged at any time for cause shown.

No. 83-565

IN THE

Supreme Court of the United States

October Term 1983

JAMES G. INGLIS,
Petitioner,

vs.

MILTON FEINERMAN, in his individual capacity as President of Federal Home Loan Bank of San Francisco; and FEDERAL HOME LOAN BANK OF SAN FRANCISCO, a corporation,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. LIEBER*
ROBERT L. ZALETEL
LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
650 California Street, 20th Floor
San Francisco, CA 94108
Telephone: (415) 433-1940

Attorneys for Respondents
MILTON FEINERMAN and
FEDERAL HOME
LOAN BANK OF SAN FRANCISCO

*Counsel of Record

QUESTION PRESENTED

Did the court below err in ruling that: (1) Petitioner's state law claims for wrongful discharge were preempted by 12 U.S.C. § 1432(a), and (2) Petitioner's attempts to create state law rights from Respondent's employment manual were void by virtue of the doctrine of federal preemption?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiff/Petitioner before this Court is James G. Inglis. The Defendants/Respondents are Milton Feinerman, in his individual capacity as President of the Federal Home Loan Bank of San Francisco, and the Federal Home Loan Bank of San Franciso, a corporation.[1]

[1]The Federal Home Loan Bank of San Francisco does not have any parent or subsidiary corporations (Supreme Court Rule 28). The Bank is under the supervision of the Federal Home Loan Bank Board. (12 U.S.C. § 1437.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Cases: **Page**

Statutes:

Other Authorities:

Cases: **Page**

IN THE

Supreme Court of the United States

October Term 1983

No. 83-565

JAMES G. INGLIS,
Petitioner,

vs.

MILTON FEINERMAN, in his individual capacity as President of Federal Home Loan Bank of San Francisco; and FEDERAL HOME LOAN BANK OF SAN FRANCISCO, a corporation,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals is reported at 701 F.2d 97 and is set forth as Appendix A to the Petition for Writ of Certiorari (hereinafter "Appendix A"). The court of appeals' order of July 5, 1983, denying a petition for rehearing and suggestion for a rehearing *en banc*, is set

forth as Appendix B to the Petition for Writ of Certiorari (hereinafter "Appendix B"). The order of the district court granting Respondents' motion for summary judgment is not reported and is set forth as Appendix C to the Petition for Writ of Certiorari (hereinafter "Appendix C").

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Federal Home Loan Bank Act, 12 U.S.C. §§ 1421*et seq.* (particularly 12 U.S.C. § 1432(a)) and the U. S. Constitution art. VI, cl. 2 (Supremacy Clause).

STATEMENT OF THE CASE

A. Introduction.

Respondent Federal Home Loan Bank of San Francisco (hereinafter "FHLB" or "Bank"), one of 12 district banks of the Federal Home Loan Bank system, was established and is maintained pursuant to the Federal Home Loan Bank Act, 12 U.S.C. §§ 1421 *et seq.* The Bank supervises federal savings and loan associations in the states of Arizona, California and Nevada as an agent of the Federal Home Loan Bank Board of Washington, D.C. Although the Bank is a federal instrumentality,[2] its member institutions own its capital stock.

---

[2]*Fahey v. O'Melveney & Myers*, 200 F.2d 420, 446 (9th Cir. 1952), *cert. denied*, 345 U.S. 952 (1953).

B. Petitioner's Termination.

On or about September 1, 1981 Petitioner James G. Inglis was terminated from his position as Vice-President and Internal Auditor of the FHLB because of his failure to adequately carry out his duties as an officer of the Bank.[3]

On October 9, 1981, Petitioner filed suit for wrongful discharge against the Bank and its President in San Francisco Superior Court. The procedural disposition of this case in the trial and appellate courts is correctly set forth in the Petition. In relevant part, this case comes before this Court from a judgment of the court of appeals affirming the district court's grant of summary judgment in favor of Respondents on Petitioner's wrongful discharge claims.[4]

---

[3]Petitioner's termination was triggered by a serious breach of his duty of confidentiality which he committed on August 20, 1981. On that date Petitioner admittedly disclosed to another Bank officer, Gary L. Curley, that Curley had been promoted to the position of Senior Vice-President at a salary below the minimum provided for such a position. The disclosure to Curley was made while approval of Curley's promotion and salary by the Board of Directors of the Bank was pending and thus constituted a breach of confidentiality by the Petitioner.

When Bank President Milton Feinerman discussed the matter with Petitioner, he admitted that he had disclosed the confidential information concerning Curley's promotion, and that what he had done was wrong (ER 269). Petitioner was also criticized for a continuous series of mistakes at the Bank, evidencing the use of extremely poor judgment. During two meetings with Feinerman, Inglis was able to offer nothing in mitigation of his conduct except his past service to the Federal Home Loan Bank system. Accordingly, Feinerman informed Petitioner he was terminated (ER 269-71).

[4]Petitioner also raised below claims that his termination infringed upon his constitutionally protected "property interest" in continued employment and his constitutionally protected "liberty interest" in his good name. These claims were rejected by the district court and the court of appeals (Appendices A, C). As Petitioner has abandoned these contentions in the instant Petition, they need not be considered by this Court (Supreme Court Rule 21.1(a)).

Rather than evidencing a radical departure from case precedent in the area, as Petitioner suggests, the decisions below were firmly grounded on the familiar principles that Petitioner's claims were preempted by the "at pleasure" language of the Federal Home Loan Bank Act, 12 U.S.C. § 1432(a), and that any purported rights under state law created by the Bank's employee handbook were void and unenforceable.

ARGUMENT AT LAW

A. Petitioner's State Law Claims Are Preempted By 12 U.S.C. § 1432(a), Which Grants The Bank The Authority To Dismiss Its Employees "At Pleasure."

The doctrine of federal preemption is basic to American jurisprudence, as it stems from the Supremacy Clause of the United States Constitution, art. VI, cl. 2. The courts have long recognized that in the field of banking, when federal law speaks in an area, state law is inapplicable to any issue that arises in that field.[5]

Congress has set forth explicit rules for the operation of the Federal Home Loan Bank system in the Federal Home Loan Bank Act, 12 U.S.C. §§ 1421 *et seq.* The statute provides that the Federal Home Loan Bank shall have the authority to dismiss its officers and employees "at pleasure":

---

[5] While the most recent example of such preemption can be found in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, ___ U.S. ___, 73 L. Ed. 2d 664 (1982) (Federal Home Loan Bank Board regulations authorizing mortgage due-on-sale clauses preempt state law), other examples are numerous: *Conference of Federal Savings & Loan Ass'ns v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd*, 445 U.S. 921 (1980) (preemption by federal law regarding credit discrimination proceedings); *Meyers v. Beverly Hills Federal Savings & Loan Ass'n*, 499 F.2d 1145, 1146 (9th Cir. 1974) (Federal Home Loan Bank Board regulations preempt California statutes relating to pre-payment of loans).

> [S]uch [district Federal Home Loan] bank shall become, as of the date of the execution of its organization certificate, a body corporate, and as such and in its name . . . shall have power . . .; to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transactions of its business, subject to the approval of the [Federal Home Loan Bank] board; to define their duties, require bonds of them and fix the penalties thereof, *and to dismiss at pleasure such officers, employees, attorneys, and agents;* and, by its board of directors, to prescribe, amend, and repeal bylaws, rules, and regulations governing the manner in which its affairs may be administered . . . .

12 U.S.C. § 1432(a) (emphasis added).

These provisions are similar to 12 U.S.C. § 341 (Fifth) of the Federal Reserve Act which gives the Federal Reserve Banks the power to "dismiss at pleasure such officers or employees." In a case with strikingly similar facts, the Ninth Circuit held in *Bollow v. Federal Reserve Bank of San Francisco,* 650 F.2d 1093 (9th Cir. 1981), *cert. denied,* 455 U.S. 948 (1982), that the preemption doctrine bars state law claims for wrongful discharge or breach of contract by employees subject to dismissal pursuant to an "at pleasure" employment statute.[6]

Here, Petitioner relies on an alleged representation in the Bank's employee handbook that he would be treated

[6]In *Bollow*, an attorney employed by the Federal Reserve Bank of San Francisco was discharged after he allegedly shouted profanities at his fellow employees. After his termination, Bollow filed suit for wrongful discharge and breach of contract based upon a letter from the Bank president promising him continued employment. The court of appeals affirmed the district court's dismissal of the action on preemption grounds. *Bollow*, 640 F.2d at 1098.

fairly and be given an opportunity to be heard on work-related problems. Recognizing that the facts in the *Bollow* case were virtually identical to those found here, the courts below ruled that: (1) 12 U.S.C. § 1432(a) of the Federal Home Loan Bank Act preempts California law and allowed the Bank to dismiss Petitioner "at pleasure," and (2) Petitioner could not state a cause of action based upon purported representations in the Bank's employee handbook, since the Bank could not lawfully limit by contract or otherwise its statutory right to dismiss its employees "at pleasure" (Appendices A, p. 4 and C, pp. 6-7).[7]

Both this case and the *Bollow* case merely illustrate the familiar principle that any federal contract or regulation in excess of statutory authority is void and unenforceable. As this Court stated in *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917):

> [T]he United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to do what the law does not sanction or permit.[8]

Petitioner also argues that under California tort law he could not be discharged for reasons contrary to public policy. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167,

---

[7]Petitioner admits that his rights purportedly created by the Bank's handbook were *contractual* in nature (Petition p. 13).

[8]*See also Schweiker v. Hansen*, 450 U.S. 785 (1981); *Augusta Aviation, Inc. v. United States*, 671 F.2d 445, 449 (11th Cir. 1982) (federal government not bound by contract which was not authorized under federal regulations); *Sims v. Fox*, 505 F.2d 857 (5th Cir. 1974) (*en banc*), *cert. denied*, 421 U.S. 1011 (1975) (Air Force regulations or contracts attempting to limit the authority of the Air Force to dismiss its reserve officers "at pleasure" void and unenforceable); *Armano v. Federal Reserve Bank of Boston*, 468 F. Supp. 674 (D. Mass. 1979) (employment contract of Federal Reserve employee void and unenforceable as it purported to require just cause for dismissal).

172 (1980); *Petermann v. International Brotherhood of Teamsters,* 174 Cal. App. 2d 184 (1959).[9] As correctly recognized by the courts below, state law cannot be used to interfere with the Bank's statutory right to dismiss its employees "at pleasure."[10]

Nor can Petitioner prevail on his newly raised argument that the Bank is estopped from allegedly failing to abide by its employee handbook. As this Court has repeatedly held, the United States is not estopped by acts of its officers or agents in excess of their statutory authority. *Utah Power & Light Co. v. United States,* 243 U.S. 389, 409 (1917); *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380, 384-85 (1947).

Petitioner also cites several cases to the effect that "agencies" of the federal government are under an obligation to follow their own lawfully promulgated regulations (Petition p. 12). However, even if the Bank were a federal "agency," it could not limit through regulation its authority to dismiss its employees "at pleasure" without exceeding its statutory authority set forth in 12 U.S.C. § 1432(a). *Sims v. Fox,* 505 F.2d 857 (5th Cir. 1974).[11] Moreover, the

---

[9]A number of states have not adopted the "public policy" exception to the "at will" employment doctrine. *See* M.S. Dichter and A.J. Gross, *A Survey Of Wrongful Discharge In The Continental United States,* American Bar Association Section on Litigation (1982). If Petitioner's position were adopted, the Bank would be subject to potentially conflicting state laws in the three-state area within which it operates – the very evil which the preemption doctrine is designed to prevent.

[10]There is not any conflict among the circuit courts in this area, as suggested by Petitioner, since none of the cases cited in footnote 2 of the Petition involved preemption by a federal "at pleasure" dismissal statute such as found here.

[11]In *Vitarelli v. Seaton,* 359 U.S. 535, 539 (1959), Executive Order No. 2738 required that employees dismissed on security grounds be afforded specific and extensive procedural protections. Any attempt to

cases cited by Petitioner involve governmental agencies which promulgated regulations which were published in the Federal Register pursuant to their rule-making authority or pursuant to an Executive Order. Petitioner has cited no cases to the effect that the provisions of a personnel manual of a federal instrumentality, such as the Bank, not codified in federal regulations, are in any way binding. Indeed, by categorizing his claims as "contractual" in nature, Petitioner concedes that his case is distinguishable from those cited on page 12 of the Petition.[12] For example, *Mazaleski v. Treusdell*, 562 F.2d 701 (D.C. Cir. 1977), involved HEW regulations which contained detailed procedures for the termination of employees (these regulations are reprinted as "Appendix A" to the *Mazaleski* opinion at 726). In contrast, the Bank's employee handbook is an internally generated document written by the Bank's management which speaks in very general terms concerning the rights of employees to be heard. As recognized by the district court, there are no specific procedural requirements in the Bank's

---

circumvent the provisions of this Executive Order would have been unlawful. In *Mazaleski v. Treusdell*, 562 F.2d 701 (D.C. Cir. 1977), while Executive Order No. 11,140 allowed the Public Health Service to dismiss its officers without their consent, it also required that terminations be carried out in accordance with regulations promulgated by the Secretary of the Department of Health, Education and Welfare ("HEW"). *Mazaleski*, at 723, Bazelon, J., concurring in part and dissenting in part. Here, the Federal Home Loan Bank Act grants the Bank plenary authority to dismiss its employees "at pleasure" without any such limitations.

[12] *Vitarelli v. Seaton*, 359 U.S. 535 (1959), involved Executive Order No. 2738, which was published in 18 Fed. Reg. 2485 (1953). *Associated Builders v. U.S. Dept. of Energy*, 451 F. Supp. 281, 286-87 (S.D. Tex. 1978) involved Department of Labor Regulations found in 29 C.F.R. subtitle A promulgated pursuant to the Davis-Bacon Act (40 U.S.C. §§ 276(a) *et seq.*).

handbook which the Bank could have followed but did not (ER 342).[13]

[13]The handbook does not purport to limit the ability of the Bank to dismiss its employees "at pleasure." In fact, the handbook specifically states that an employee's breach of confidentiality is grounds for *immediate dismissal* (ER 178-179).

But, assuming, *arguendo,* that the Bank was required to comply with the termination guidelines and that it failed to do so, the Petitioner's remedy would be an order that it comply with these procedures. *Vitarelli v. Seaton,* 359 U.S. 535, 546 (1959). Petitioner does not request that the Bank comply with the procedures in its employee handbook but rather seeks compensatory and punitive damages. Thus, dismissal of such claims was proper.

CONCLUSION

Petitioner has not articulated a valid ground under Supreme Court Rule 17 that would warrant the granting of his Petition for Writ of Certiorari. There is no conflict among the courts in this area, as it is well established that (1) federal law preempts state law and allows the Bank to dismiss its employees "at pleasure," and (2) any alleged contractual obligations of the Bank which purported to limit the Bank's right to dismiss its employees "at pleasure" would be *ultra vires* and thus void. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF
& TICHY
A Professional Corporation

By: ROBERT M. LIEBER
Counsel of Record

By: ROBERT L. ZALETEL

Attorneys for Respondents
MILTON FEINERMAN and
FEDERAL HOME LOAN BANK
OF SAN FRANCISCO

December 5, 1983